SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 378

KENNETH J. MULLANE, AS SPECIAL GUARDIAN AND ATTORNEY, ETC.,

Appellant,

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY, AS TRUSTEE, ETC., ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

KENNETH J. MULLANE,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 378

KENNETH J. MULLANE, as Special Guardian and Attorney for Each Infant Not Appearing by His General Guardian, Each Lunatic, Idiot, Habitual Drunkard and Other Incompetents Not Appearing by a Committee, and Each Other Party Known and Unknown, Who Has Not Otherwise Appeared in This Proceeding, Who Had, Has, or May Hereafter Have, Any Interest in the Income of the Below-named Discretionary Common Trust Fund No. 1, *Appellant,*

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee of Discretionary Common Trust Fund No. 1 of Central Hanover Bank and Trust Company Established under Plan of Operation Dated December 20, 1945, *and*

JAMES N. VAUGHAN, as Special Guardian and Attorney for Each Infant Not Appearing by His General Guardian, Each Lunatic, Idiot, Habitual Drunkard and Other Incompetents Not Appearing by a Committee, and Each Other Party Known and Unknown, Who Has Not Otherwise Appeared in This Proceeding, Who Had, Has, or May Hereafter Have Any Interest in the Principal or Capital of the Above-named Discretionary Common Trust Fund No. 1, *Appellees*

JURISDICTIONAL STATEMENT PURSUANT TO RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

(The numbers in brackets below refer to folios of the Record on Appeal to the Court of Appeals, those preceded

by the letter "R" referring to the original Record and those preceded by "S. R." referring to the Supplemental Record.)

Comes now Kennteh J. Mullane, as Special Guardian and Attorney as aforesaid, appellant herein, and files the following statements as required by Rule 12 of the Supreme Court of the United States.

I. Basis upon Which It Is Contended That the Supreme Court of the United States Has Jurisdiction

The judgment appealed from is a final judgment rendered by the Court of Appeals of the State of New York, the highest court of the State of New York in which a decision in such cause could be had, and there is drawn in question the validity of a statute of the State of New York on the ground of its being repugnant to the Constitution of the United States and said decision of the Court of Appeals is in favor of the validity of said statute.

(a) The statutory provision believed to sustain the jurisdiction herein of the Supreme Court of the United States is Title 28, United States Code, Section 1257; Act of June 25, 1948, Chapter 646, Section 39; 62 Stat. 992.

(b) The statute of the State of New York, the validity of which is involved herein, is subdivision 12 of Section 100-c of the Banking Law of the State of New York; Book 4, McKinney's Consolidated Laws of New York, pp. 142-143; Section 100-c (12): Chapter 687, Laws of 1937, Section 1, effective July 15, 1937 (renumbered from Banking Law Section 188-a to Section 100-c by Chapter 687, Laws of 1937, Section 2). Such subdivision 12 provides as follows:

> "12. After filing such petition the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each

week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund. Such notice or citation shall include the name of each person acting with the trust company in a fiduciary capacity with respect to each such estate, trust or fund. Such notice or citation shall require all such parties to show cause on a day to be fixed by the court why such account should not be judicially settled. Upon the filing of such petition the court shall appoint two competent and responsible persons, one to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each lunatic, idiot, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or who may thereafter have any interest in the income of such common trust fund, and the other of such competent and responsible persons to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each idiot, lunatic, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or may thereafter have any interest in the principal or capital or such common trust fund. In any such accounting proceeding the notice or citation hereinabove prescribed shall be deemed sufficient notice to each party known or unknown having or who may thereafter have any interest in an estate, trust or fund any part of which shall have been invested in such common trust fund and each such person so interested may appear in such accounting proceeding and on his failure to

appear shall be deemed to be represented in such proceeding by the person designated respectively as such guardian and attorney."

(c) The date of the judgment of the Court of Appeals sought to be reviewed herein is June 3, 1949. The date upon which the application for appeal is presented is August 26, 1949.

II. The Nature of the Case and the Rulings of the Court Which Bring the Case Within the Jurisdictional Provisions Relied On.

(a) This proceeding was commenced by the filing in the Surrogate's Court, County and State of New York, on March 28, 1947, of the account of proceedings of Central Hanover Bank and Trust Company, as Trustee of its Discretionary Common Trust Fund No. 1, established under Plan of Operation dated December 20, 1945, and created and operated under and pursuant to Section 100-c of the Banking Law of the State of New York (Ch. 687, L. 1937 as amended by Ch. 602, L. 1943 and Ch. 158, L. 1944) and by the filing in said court on the same day of the petition of said Central Hanover Bank and Trust Company, as Trustee as aforesaid, for the judicial settlement of said account of proceedings and related relief [R. 17-19; 600-601].

Appellant is the Special Guardian and Attorney appointed pursuant to the provisions of said subdivision 12 of said Section 100-c to represent persons interested in income [R. 59; 643]. Respondents are the accounting Trustee and the Special Guardian and Attorney appointed pursuant to said subdivision 12 to represent persons interested in principal [R. 17-19; 600-601; 57-58; 642].

In said proceeding, appellant as Special Guardian and Attorney appeared specially and served his preliminary re-

port and answer contesting the jurisdiction of the court upon the ground, among others [R. 163-168]:

> "That the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of 'due process of law' under . . . the Federal constitution, and that the notice given herein is inadequate to confer jurisdiction upon this Court."

Said Surrogate's Court by its intermediate decree, dated November 27, 1947, overruled said contention and held that [R. 66]

> ". . . all of the proceedings taken under Section 100-c of the Banking Law including the service of the citation herein made in the form prescribed by Section 100-c of the Banking Law . . . constituted due process of law in conformity with the requirements of . . . the Constitution of the United States."

The opinion of the Surrogate [R. 469-536] is annexed hereto as Exhibit "A".

Appellant appealed from said intermediate decree to the Appellate Division of the Supreme Court of the State of New York held in and for the First Judicial Department and said Appellate Division by order dated June 21, 1948, affirmed said decree (one justice dissenting) [R. 580-587]. The majority wrote no opinion [R. 736-742]. The dissenting opinion is annexed hereto as Exhibit "B" [R. 743-765].

Thereafter, your appellant filed his report, dated August 11, 1948, as such Special Guardian and Attorney [R. 676-711] (subject to stipulation that the same should not prejudice his right to appeal from any determination theretofore or thereafter made respecting said objection or his right to a hearing and determination on the merits respecting said objection of any such appeal [R. 673-675]) and reasserted verbatim his objection quoted above. Said ob-

jection was again overruled by final decree of said Surrogate's Court, dated August 12, 1948, in terms identical to those of said intermediate decree quoted above [R. 663].

Appellant then appealed to said Appellate Division of the Supreme Court, First Judicial Department, from said final decree, which decree was affirmed by order of said Appellate Division dated April 28, 1949 (one justice dissenting on the same grounds as in the case of said appeal from said intermediate decree) [S. R. 214-218].

Appellant then appealed to the Court of Appeals of the State of New York from said order of said Appellate Division dated June 21, 1948, affirming said intermediate decree [S. R. 242-248]. Said appeal was pursuant to leave granted by order of said Appellate Division dated March 29, 1949, which order certified certain questions to the Court of Appeals, including the following [S. R. 257]:

> "Is due service of a notice pursuant to subdivision 12 of Section 100-c of the Banking Law sufficient to confer jurisdiction over persons interested in the income of a common trust fund, and to meet the requirements of 'due process of law' under the Federal . . . Constitution with respect to said persons?"

Appellant also appealed to said Court of Appeals from said order of said Appellate Division, dated April 28, 1949, affirming said final decree [S. R. 206-212]. Said two appeals were heard together.

By final judgment of said Court of Appeals, dated June 3, 1949, both said orders of the Appellate Division were unanimously affirmed and said question certified by said Appellate Division to the Court of Appeals was answered in the affirmative. The remittitur of said Court of Appeals with the record in said cause has since been filed in the office of the Clerk of the Surrogate's Court, New York County, in accordance with law and there remains as the final deter-

mination in said cause, except that the remittitur in said appeal taken by leave of said Appellate Division was in accordance with law returned to said Appellate Division and there remains with a duplicate of said record as a final determination in said intermediate appeal.

The validity of a statute of the State of New York was therefore brought into question on the ground of its being repugnant to the Constitution of the United States by explicit answer and objection asserted at the earliest opportunity and consistently urged throughout said cause and the final judgment and decision of the highest court in said state in which a decision could be had was in favor of the validity of said statute.

(b) Cases believed to sustain jurisdiction. See *Wuchter* v. *Pizzutti*, 276 U. S. 13, esp. pp. 15-19, wherein the Supreme Court of the United States on an appeal from a decision of the Supreme Court of the State of New Jersey passed upon the validity of a statute of that state and the sufficiency of its provisions respecting the service of process to comply with the requirements of due process under the Constitution of the United States. See also *McDonald* v. *Mabee*, 243 U. S. 90, 90-92, where on an appeal from the Supreme Court of the State of Texas the issue was whether a state statute violated the due process clause of the Fourteenth Amendment; and such cases as *Webster* v. *Reid*, 52 U. S. 437, 456-457, 459-460, and *Security Savings Bank* v. *California*, 263 U. S. 282, wherein the Supreme Court of the United States also passed upon the validity of the provisions or application of state statutes challenged on the ground of "due process of law."

(c) The stage of the proceedings in the court of first instance and in the appellate courts at which and the manner in which the federal questions sought to be reviewed were raised, the method of raising them and the way in which

they were passed upon by the court with pertinent quotations of specific portions of the record supporting the claim that the rulings of the court were of a nature to bring the case within the jurisdiction of the Supreme Court of the United States are set forth above in the statement of the nature of the case and the rulings of the court.

No opinion was delivered in any of the New York courts, except the opinion of the Surrogate and the dissenting opinion in the Appellate Division, First Department, copies of which are annexed hereto as Exhibits "A" and "B".

III. Grounds upon Which It Is Contended That the Questions Involved Are Substantial

It has been said and it is true, that from the aspect of trust administration a common trust fund has the virtue of constituting a vehicle of diversified investment for small trusts (*Matter of Bank of New York*, 189 Misc. (N. Y.) 459, 67 N. Y. Supp. (2d) 444 at p. 447) and a recent national survey disclosed that 73.5 per centum of all trusts in the care of trust institutions have an average annual income of $788.00 (26 *Trust Bulletin* 2, May 1947) which would indicate an average principal of the value of approximately $27,000.00. Since in New York the permissible amount of investment in a common fund from any one trust is now $50,000.00 (*Matter of Bank of New York, supra;* subd. 1, sec. 100-c, Banking L. as amended, Book 4 McKinney's Consolidated Laws of New York, 1949 Cumulative Annual Pocket Part pp. 35-36; Regulations Banking Board, Art. III, sec. 2 [R. 282]), it is readily apparent that the majority of, if not all, small trusts will be wholly invested in common trust funds [R. 762].

The beneficiaries of the separate funds participating in even a single common trust fund run into the thousands [R. 230, 246], many of whom are non-residents of New

York [R. 213, 217]. The property rights and interests of such beneficiaries, such as apportionments between principal and income, the legality of investments and the liability of the Trustee for maladministration or waste are adjudicated in the common trust fund accounting [R. 500]. Thus, it will be seen that substantial rights and interests of literally thousands of persons will be affected by the ultimate decision herein. The real importance of the questions herein is perhaps best demonstrated by the fact that several New York banks or trust companies are withholding the institution of common trust funds pending the final disposition of this cause.

The substantial nature of such questions is perhaps most clearly evidenced by the emphatic dissent by Mr. Justice Van Voorhis from both orders of the Appellate Division herein [R. 743-765; S. R. 218], the opinion of Mr. Surrogate Witmer in *Matter of Security Trust Co. of Rochester*, 189 Misc. (N. Y.) 748, 70 N. Y. Supp. (2d) 260, presenting similar questions, both of which opinions are contrary to the decision of the Court of Appeals herein, and by the fact that not one of the statutes of the twenty-eight other States of the Union, which have enacted common trust fund legislation, contains a provision therein providing for service on both non-resident and resident persons whose names and addresses are known, solely by publication of a process in which such individuals are not named without any supplemental mode of service such as mailing; the New York Act is unique in this respect [R. 758-759]. Such fact becomes one of added significance when it is remembered that New York legislation in a new field frequently serves as a model for legislation in other States, and when it is recalled that the legislatures in at least twenty-five of these other States had a period ranging from four to ten years after the enactment of Section 100-c in 1937 within which to study our statute before passing their own common trust fund Acts.

In view of the decisions cited previously as to the Constitutional requirements of notice and hearing, it is a fair inference that *these other State legislatures studied and rejected as contrary to "due process" the type of notice of the account authorized by Section 100-c of our Banking Law.*

If the decision of the Court of Appeals of the State of New York in the present cause is permitted to stand unreviewed by the United States Supreme Court great uncertainty will prevail, not only in the State of New York, but also in more than half of the other States of the Union, as to the type of process required by the Constitution of the United States upon the judicial settlement of the account of a trustee of a common trust fund.

The people chiefly affected by the decision of the New York Court of Appeals in the present cause are those of average means, particularly widows, orphans and mentally incompetent persons whose welfare is a special concern of all courts.

Finally, it cannot be determined whether the triennial accountings required under New York law by each Common Fund Trustee, subdivision 10 of Section 100-c, Banking Law, as amended, Book 4 McKinney's Consolidated Laws of New York, 1949 Cumulative Annual Pocket Part, p. 38) have been and will continue to be only a nullity and a futile expense to the trust until the questions herein are passed upon by the Supreme Court of the United States.

Conclusion

It is respectfully submitted that this is a proper cause for the allowance of an appeal to the Supreme Court of the United States.

KENNETH J. MULLANE,
Counsel for Appellant.

APPENDIX "A"

Opinion of Collins, S.

(The New York Law Journal

November 7, 1947)

[Italics so in original]

The petitioner established a discretionary common trust fund on January 31, 1946, pursuant to a certificate of authority issued by the Banking Board of the State of New York (Banking Law, sec. 100-c, subdiv. 1; Regulations, Banking Board, Art. I, 1). In obedience to the legislative mandate that not "less than twelve nor more than fifteen months after the date on which a common trust fund is established" the trustee must file an account of its proceedings, the petitioner filed its account on March 28, 1947, together with a petition for its judicial settlement (Banking Law, sec. 100-c, subdiv. 10). Upon the filing of the petition, the court appointed two special guardians as prescribed by subdivision 12 of the statute, one to represent infants, incompetents and persons known or unknown who do not otherwise appear in the proceeding and who have any interest in the *income* of the fund and the other to represent similar persons interested in the *principal* or *capital* of the fund. The proceeding for the settlement of the account was thereupon conducted in accordance with the requirements of law. No person has appeared in the proceeding except the petitioner and the two special guardians.

The special guardian representing income beneficiaries filed a preliminary report challenging the jurisdiction of this court to render a decree in the proceeding. The grounds of the preliminary challenge to jurisdiction are identical with those upheld by the learned surrogate in *Matter of Security Trust Co. of Rochester* (189 Misc., ——, 70 N. Y. Supp., 2d 260), namely, that *first*, the account shows that petitioner has commingled in the common trust fund investments from inter vivos trusts and from testamentary trusts and this court has no jurisdiction at all over inter vivos trusts and

therefore lacks power to make a valid decree herein; and *second*, the provisions in section 100-c of the Banking Law respecting notice of the proceeding for judicial settlement of the account are wholly insufficient to meet the requirements of "due process of law" under the Federal and State Constitutions, and accordingly the notice given to persons interested in the participating estates is inadequate to confer jurisdiction upon the court to make a binding decree.

The petition for the settlement of the account shows that during the period covered by the account there were one hundred thirteen estates or funds participating in the common trust fund, of which fifty-six were trusts created by agreements of trust and fifty-seven were trusts created by testamentary instruments. The gross capital fund accounted for is $2,926,437.25.

There can be no doubt that the "jurisdiction of the surrogate is the creation of statute. If not conferred upon him it does not exist" (*People ex rel. Safford* v. *Surrogate's Court*, 229 N. Y., 495, 497). We must turn, therefore, to the statutory authority to entertain this proceeding. It is found in chapter 687 of the Laws of 1937, which added section 100-c to the Banking Law (secs. 1 and 2) and amended section 40 of the Surrogate's Court Act by the addition of a new subdivision 10 (sec. 4). The first reference to the jurisdiction of the surrogate is in subdivision 10 of the new section 100-c. That subdivision has been amended in respect of the *time* of filing accounts (L. 1943, chap. 602), but remains unchanged in respect of the court wherein the account may be filed. The statute in so far as material reads:

> "* * * each trust company maintaining any such common trust fund shall file an account of its proceedings in respect thereof *either* in the office of the clerk of the supreme court in the county in which such trust company maintains its principal office or *in the office of the surrogate of such county* and shall within five days thereafter furnish the superintendent (of banks) with a copy thereof. Upon filing such an account, such trust company shall file therewith a petition for its judicial settlement and shall proceed with such judicial

settlement in the supreme court if the account is filed in the office of a clerk of that court *or in the surrogate's court if the account is filed in the office of the surrogate.*" (Emphasis supplied.)

Section 40 of the Surrogate's Court Act, as amended by the very same legislative enactment, reads:

"Each surrogate must hold, with his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

• • • • • • •

"10. To settle, as provided in the Banking Law, the account by a corporate fiduciary of its proceedings in respect of a common trust fund maintained by it pursuant to such law."

It would seem that there is here a legislative grant of authority too clear to admit of serious doubt. We ascribe to the words of the statute their plain and ordinary meaning. A trust company maintaining a common trust fund is told that within a prescribed time it must file an account of its proceedings in respect thereof and that it may do so either in the Supreme Court in the county where it maintains its principal office or in the Surrogate's Court of that county. It is told further that if its account is filed in the Surrogate's Court it *must* proceed with its judicial settlement in that court. Finally, the surrogate is given express authority to settle the account of a trustee of a common trust fund maintained pursuant to the banking law. The grant of power to the surrogate in respect of the settlement of the account of a trustee of a common trust fund is not restricted or made conditional in any way.

If there could be any possible lingering doubt as to the broad jurisdiction granted to the surrogate by the quoted text, it is completely dispelled when the text is read in the light of the entire section. It is not disputed that under the terms of section 100-c a corporate fiduciary may invest

in a single common trust fund any moneys held by it "as executor, administrator, guardian, *personal* or *testamentary* trustee, or committee" (subdiv. 1; emphasis supplied). The only restriction placed upon the fiduciary of the estate or trust is that such investment cannot be made where the instrument, order, decree or judgment under which the moneys are held forbids such investment. Only one distinction is made by the Legislature in respect of separate types or categories of common trust funds and that distinction is based upon the investment powers of the fiduciary and not upon the form of the instrument under which he holds the moneys. "Each common trust fund shall be known either as a legal common trust fund or a discretionary common trust fund" (subdivision 3). Within the limitations of subdivision one of the statute, there may be invested in a legal common trust fund "the moneys of *any estate, trust or fund.*" In a discretionary common trust fund there may be invested "the moneys of *any estate, trust or fund*" when the instrument or order under which the moneys are held gives the fiduciary the broad powers of investment specified in the statute. The division of common trust funds into two broad types based upon the investment powers of the fiduciary is reasonable and logical. A division into classes based upon the form of the instrument under which the fiduciary holds the funds would serve no useful purpose and would require further subdivisions within each category, thus destroying the concept of a *common* fund and creating a multitude of small, separate funds. It is likewise clear beyond doubt that when a common trust fund includes investments by estates, testamentary and inter vivos trusts, the trustee must account for all of its transactions in the one accounting proceeding (Banking Law, sec. 100-c, subdivs. 10, 11; *Matter of Security Trust Co. of Rochester*, supra. Thus, we have a clear statutory authorization to commingle in one common fund moneys held "as executor, administrator, guardian, personal or testamentary trustee, or committee" and a direction to account for all transactions in the common trust fund. Such accounting of the commingled funds may take place either in the Supreme Court or the Surrogate's Court.

The close study of subdivision 10 in the light of its setting serves only to render its meaning more luminous. The unconditional grant of authority for filing an account in the Surrogate's Court can only be interpreted as relating to any common trust fund which a corporate fiduciary is permitted to establish regardless of the source of the multiple funds which constitute the common fund. The fund is to be administered and managed as a separate legal entity wholly apart from the estates or funds who hold participations therein. Accounting is to be rendered of the aggregate fund as a separate legal entity. Jurisdiction is conferred upon the court to entertain the accounting of this new and distinct legal entity wholly apart from any jurisdiction that may have existed in respect of the different legal personalities who hold participating interests in the common trust fund.

In conferring jurisdiction over accountings of common trust funds the Legislature was perhaps guided by the fact that accountings in the estates whose funds were invested in the common funds are conducted either in the Supreme Court which possesses jurisdiction over all the estates or funds or in the Surrogate's Court which has jurisdiction over decedent's estates, guardians and testamentary trusts. The grant of jurisdiction which the Legislature made was under the circumstances not unnatural. There was no intent on the part of the Legislature, however, to dissolve the common fund when once established into its component parts or to make jurisdiction attach only when jurisdiction theretofore existed over fiduciaries owning participating interests in the common fund.

In support of his argument that the surrogate has no jurisdiction over a common trust fund accounting which includes inter vivos trusts as participating interests, the objecting special guardian contends that if the statutes are interpreted as granting such jurisdiction it will result in an enlargement by implication of the surrogate's jurisdiction so as to include inter vivos trusts. The same view is held by the learned surrogate in *Matter of Security Trust Co. of Rochester* (supra). The grant of jurisdiction over common trust funds is not at all the equivalent of a grant of juris-

diction over the participating estates, trusts or funds. The distinction was clearly pointed out by the coordinate branch of this court in *Matter of Bank of New York* (189 Misc., 459, 469), wherein it was held that in the common trust accounting the court had no power to construe the instruments which created the separate estates or trusts. The court pointed out that its "concept of the common trust fund requires the court to deal with such a fund as an entity separate from the trustee and separate from the individual estates whose moneys are invested in participations in the fund" (p. 463). It said further:

> "This accounting plan is designed to enable judicial scrutiny to be made under proper auspices of the management of the entity created by the statute and regulated by the Banking Board. It is not a substitute for an accounting in the underlying estates, trusts or funds. When individual accountings in individual estates or funds are had, it will be appropriate to construe the underlying instruments creating such trusts or funds. Here the court should and does limit itself to ascertainment whether the trustee of the common fund has properly accounted for all of the assets received by it and has properly managed the fund so as to secure to participants their rights in principal and income thereof."

With this reasoning this branch of the court has heretofore expressed its concurrence (*Matter of Continental Bank and Trust Co.*, —— Misc., ——; 67 N. Y. S., 2d, 806, 807).

The court holds that jurisdiction to settle the account of the petitioner has been expressly conferred upon it by the Legislature. This objection of the special guardian is, therefore, overruled.

The second ground of challenge to the jurisdiction of the court is that the provisions of section 100-c relating to the notice to be given persons interested in the accounting proceeding do not meet the requirements of "due process of law" under the Fourteenth Amendment to the Constitution of the United States and under article 1, section 6, of the Constitution of the State of New York.

> "The fundamental requisite of due process of law is the opportunity to be heard. * * * And it is to

this end, of course, that summons or equivalent notice is employed" (*Grannis* v. *Ordean*, 234 U. S., 385, 394).

No fixed form of notice is prescribed. Whether or not a form of notice meets constitutional requirements will depend upon the nature of the action, the character of the relief demanded and the circumstances involved. More exacting requirements must be satisfied if the action is in personam than if the action were in rem or quasi in rem (*Grannis* v. *Ordean*, supra, p. 392; Restatement of Judgments, sec. 6, comment g). However, the due process clause does not impose unattainable standards in any case. All that is required by the constitution is that the kind of notice and the method of giving it be reasonably adapted to the circumstances of the case, the nature of the proceedings and its subject matter (*Ballard* v. *Hunter*, 204 U. S. 241, 255; *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283; *Security Sav. Bank* v. *California*, 263 U. S. 282; *American Land Co.* v. *Zeiss*, 219 U. S. 47, 66; *Campbell* v. *Evans*, 45 N. Y. 356, 359; Restatement of Judgments, sec. 6, sec. 32, comment f). The rule as generally enunciated is that the notice must be reasonably adequate to apprise those whose rights are affected of the proceeding against them and to afford them a reasonable opportunity to be heard (*City of New York* v. *Wright*, 243 N. Y. 80, 84; *Matter of Empire City Bank*, 18 N. Y. 199, 215).

It is not constitutionally indispensable in every case that notice of a proceeding must be brought to the personal attention of the parties. In some cases general publication or posting of notice is all that can reasonably be required (*Campbell* v. *Evans*, supra; *Matter of Empire City Bank*, supra; *Christianson* v. *King County*, 239 U. S. 356, 373; *Huling* v. *Kaw Valley R'y*, 130 U. S. 559; *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276; *Wick* v. *Chelan Electric Co.*, 280 U. S. 108, 111; *Lamb* v. *Connolly*, 122 N. Y. 531; *State of New York* v. *Gebhardt*, 151 Fed. 2d 802). It has been established that a proceeding for the probate of a will is essentially in rem and that general publication or posting of notice is sufficient (*Everett* v. *Wing*, 103 Vt. 488, 156 A., 393, cert. denied 284 U. S. 690; *Goodrich* v. *Fer-*

ris, 214 U. S. 71, 80, 81; *Donnell* v. *Goss*, 269 Mass., 214; 169 N. E. 150). It has been held, too, that an administration of the estate of a decedent, including proceedings for the settlement of the account of the fiduciary and the distribution of the assets, are proceedings in rem and general notice to interested parties by publication is sufficient under the constitution (*Goodrich* v. *Ferris, supra; Christianson* v. *King County*, supra, p. 373; *Roseman* v. *Fidelity & Deposit Co. of Md.*, 154 Misc. 320).

Since direct personal notice is not required in every case, it remains only to determine whether the kind and manner of notice prescribed by the Legislature in this instance was reasonably sufficient under the circumstances to apprise parties interested of the legal steps which were being taken and to enable them to avail themselves of the right to come in and be heard.

The establishment of common trust funds was authorized by the Legislature for the purpose of making the services of corporate fiduciaries available to smaller estates and enabling the small estates or funds to obtain the advantage of diversification of risk and greater safety of principal that is normally obtainable only by the larger investors (*Matter of Bank of N. Y.*, 189 Misc., 459, 463; 2 Scott on Trusts, p. 1216; "Commingled Investment by Corporate Fiduciaries in Pennsylvania," 87 U. Pa. Law Review, 577, 578). Various different types of common trust funds have been in use in other states (87 U. Pa. Law Review, supra, p. 580; Bogue, "Common Trust Fund Legislation," 5 Law & Contemporary Problems, 430, 431; "The Common Trust Fund Statute," 37 Col. L. Review, 1384, 1387), and of these our Legislature has validated a form and type best calculated to meet our needs. A common trust fund in this state is a legal entity distinct from the estates or funds whose moneys are invested (*Matter of Bank of N. Y.*, supra). The administration of the various estates and trusts continues separately under the regularly appointed fiduciaries. The accounting of the trustee of the common fund is not a substitute for an accounting in the underlying estates, trusts or funds (*Matter of Bank of N. Y.*, supra), and though it settles all questions respecting the manage-

ment of the common fund, it provides no solution of the many varied problems peculiar to the underlying estates that necessarily arise in their separate administration.

The success of the common trust fund depends upon its use by large numbers of small estates and trusts. Its use by small estates would not be expected to spread unless it could be carried on without substantial additional expense. Its attractiveness to beneficiaries of estates and trusts required that there be appropriate provisions in the statute governing self-dealing by the corporate fiduciary and assuring adequate supervision of the management of the fund. All of the various aspects of the problem received the careful attention of the Legislature and were dealt with in the extensive provisions of the statute. In addition to the legislative directions contained in the statute itself, the Legislature conferred upon the Banking Board a broad power of supervision over and regulation of the management of the fund (chap. 687, L. 1937, sec. 3, now Banking Law, sec. 14, subdiv. 1-c). It directed that a copy of the rules and regulations of the Banking Board be furnished each county clerk, who under the constitution of this state is the Clerk of the Supreme Court (art. 6, sec. 21) and each surrogate.

In respect of notice to beneficiaries, subdivision 9 of section 100-c of the Banking Law provides that at the time of making the first investment of any estate, trust or fund in a common trust fund the trust company must send a notice to each person of full age and sound mind whose name and address is known to it, and who is then known to claim to be entitled either to share in the income of the estate, trust or fund or to have such an interest in the principal that if the event upon which it is to be distributed had occurred at the time of the sending of such notice, he would share in such distribution. The notice must apprise the person that moneys of the estate, trust or fund have been invested in the common fund and that additional moneys may be invested without further notice. Subdivision 9 further directs that there "shall be included in or appended to such notice a copy of the provisions of this section in respect of the sending of such notice and *of the judicial settlement of the ac-*

counts of such trust company for such common trust fund." (Emphasis supplied.) The statute provides that the decree entered in any accounting proceeding respecting the common trust fund shall not be conclusive against any person to whom the trust company was required to send such notice, but to whom such notice was not sent unless a notice shall have been sent to such person at least thirty days prior to the entry of the decree on accounting. If notice is sent less than thirty days prior to the entry of such decree the person to whom the notice is sent shall have sixty days after the mailing of the notice to apply to vacate the decree as to him. If any such notice is sent after the institution of an accounting proceeding the notice must also state that the proceeding is pending and the name of the court in which it is pending. In respect of a notice sent after the entry of a decree on accounting there must also be stated the fact that such decree has been entered and the date and place of such entry.

When the notice which the trust company is required to send to known beneficiaries is received, the beneficiary is apprised of the fact that the statute makes it mandatory upon the trustee to file regular accountings and to proceed with the judicial settlement of those accounts. He is advised that the first account must be filed not less than twelve nor more than fifteen months after the date of establishment of the common trust fund and that accounts must be filed triennially thereafter. He is further told that the judicial setlement of the account must take place either in the Supreme Court in the county in which the trust company maintains its principal place of business or in the Surrogate's Court of that county. The beneficiary is also informed that he has a right to appear in any accounting proceeding and that if he fails to do so, a special guardian will be appointed to represent him.

The rules and regulations of the Banking Board also contain provisions for acquainting the beneficiaries with information respecting the common trust fund. At least once each year the trust company must cause an audit of the common trust fund to be made. The report of the audit must contain data set forth in these rules. The trust com-

pany is required to send a copy of the latest report of the audit to each person to whom a regular periodic accounting of the estates or funds ordinarily would be rendered or shall advise each person annually that the report is available and that a copy will be furnished upon request (Regulations of Banking Board, Art. X, 3). The regulations further provide that all accounting records, registers, statements and audits pertaining to the common trust fund for the period subsequent to that covered by the last judicial account shall be subject to inspection on the three business days next succeeding any valuation date by any adult and competent person, by the guardian of an infant or by the committee of an incompetent when it appears that the adult person, the infant or incompetent is a person interested in a participating estate, trust or fund (Art. X, 6).

The regulations of the Banking Board also provide that no trust company shall establish a common trust fund unless it shall have submitted a plan of operation to the Banking Board and shall have received the written permission of the Banking Board to do so (Art. I, 3). The plan of operation of the fund accounted for provides that there shall be appended to the notice required to be sent interested persons under the terms of subdivision 9 of section 100-c of the Banking Law a copy of the provisions of subdivisions 9, 10, 11, 12, 13, 14 and 15 of section 100-c (section 2.4). It provides that a copy of the plan must be kept on file in the principal office of the trust company and shall be available for inspection during banking hours by any persons interested in any participating trust and that a copy of the plan shall be given on reasonable request to each person interested in any participating trust (sec. 11.1). The plan of operation contains provisions relating to right of inspection similar to those contained in the regulations of the banking board, but making the provisions expressly applicable to this common trust fund by giving the location of the office where the plan is to be kept and where the various records may be inspected (id.).

These preliminary notices and rights of inspection sufficiently inform each beneficiary that an investment has been made in the common trust fund, the manner in which the

fund is to be managed, and the nature and extent of state administrative and judicial supervision. He is given sufficient information so that he can keep himself informed of the various stages of the administration of a common fund and of the periodic accountings which must be judicially settled. The statutory provisions appended to the notice tell each beneficiary that the petition in each accounting proceeding shall contain a list of all participating estates or trusts and that it need describe them by stating the name of the decedent in the case of a decedent's estate or testamentary trust, the name of the infant or incompetent in the case of such estates or the name of the donor or grantor of a living trust and the date of the instrument. If a will sets up more than one testamentary trust there must be given the number of the paragraph creating the participating trust or other appropriate identification.

In respect of the more specific notice to be given in each separate accounting proceeding, subdivision 12 of section 100-c of the Banking Law reads:

> "After filing such petition the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any such estate, trust or fund. Such notice or citation shall include the name of each person acting with the trust company in a fiduciary capacity with respect to each such estate, trust or fund. Such notice or citation shall require all such parties to show cause on a day to be fixed by the court why such account should not be judicially settled. Upon the filing of such petition the court shall appoint two competent and responsible persons, one to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for

each lunatic, idiot, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or who may thereafter have any interest in the income of such common trust fund, and the other of such competent and responsible persons to appear as special guardian and attorney for each infant not appearing by his general guardian and to appear for each idiot, lunatic, habitual drunkard or other incompetent not appearing by a committee and to appear for each other party known or unknown who does not otherwise appear in such proceeding who has or may thereafter have any interest in the principal or capital of such common trust fund. In any such accounting proceeding the notice or citation hereinabove prescribed shall be deemed sufficient notice to each party known or unknown having or who may thereafter have any interest in an estate, trust or fund any part of which shall have been invested in such common trust fund and each such person so interested may appear in such accounting proceeding and on his failure to appear shall be deemed to be represented in such proceeding by the person designated respectively as such guardian and attorney."

The fund now accounted for has 113 participating estates or trusts in which there are some 315 persons known to be interested. This fund has not yet reached the maximum amount compatible with efficient and orderly management. The number of persons who will be interested when such limit is reached cannot of course, now be estimated. It is apparent that in any accounting of a common trust fund personal service of citation on all persons would entail considerable expense. With frequent accounting proceedings in each common fund this expense would, when added to other necessary charges, impose financial burdens so large as to overcome the advantages of the common fund. The objecting special guardian does not contend that personal service on all interested persons should be required. Even service by mail upon *all* parties interested would involve

a disproportionate expense, for the trustee would then be required to make extensive investigations prior to each accounting proceeding to complete the record of the births, deaths and other occurrences which might increase, decrease or otherwise change the groups of interested persons. In an accounting proceeding in a single trust it frequently happens that the trustee is required to make investigation respecting the proper parties not only immediately prior to initiation of the proceeding but also during the pendency of the proceedings. Not infrequently one or more parties die and their personal representatives must be substituted; persons newly born must be brought in by supplemental citation. Where there are a large number of parties who are not members of a closely knit family circle and where the changing circumstances require a construction of the instrument in order to determine who are necessary parties, the investigation by counsel for the trustees necessarily increases the expenses of the proceeding. In view of this experience in ordinary accounting proceedings it is not urged—and in any event it could not reasonably be urged —that the constitution requires that direct notice of the accounting be brought to the attention of every party interested in the underlying estates and trusts.

The special guardian, argues, however, that the minimum that should be required is that notice by mail be given to all known parties of the classes specified in subdivision 9 of section 100-c. The question before the court, however, is not whether the Legislature should as a matter of grace have required continuing notice of the steps to be given to known parties but whether the form and kind of notice prescribed by the Legislature are sufficient under all the circumstances to satisfy the requirements of the federal and state constitutions.

In *Matter of Empire City Bank* (18 N. Y., 199, 216), the court said:

> "If we hold, as we must, in order to sustain this legislation, that the constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, it then belongs to the legislature to determine in the particular instance

whether the case calls for this kind of exceptional legislation, and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him. A case may be supposed where the reason for departing from the more safe rule of the common law is so plainly frivolous, or the provision for notice is so clearly colorable and illusory, that the courts would be called upon to declare the enactment a fraud upon the constitution. * * * In the case under consideration, there was at least a plausible reason for not requiring actual notice. The shareholders in banking associations are frequently very numerous, and although the books ought to disclose their names, such is not always the case. Everyone in any way connected with a bank would be likely to hear of a fact so notorious as that it had stopped payment, and that its affairs had passed into the hands of a receiver. If, then, all of the parties sought to be charged who reside in the same town are actually notified, and public notice is given in several public journals in regard to all others, the parties interested will be likely to hear of the proceeding. The probability of actual notice would be equally great in respect to the creditors; as the holders of the liabilities of a bank are usually among the most likely to know that it has failed. I conclude, therefore, that the proceeding does not lose the character of legal process, within the constitutional provision, by the omission to require personal notice to be given to all the parties to be charged as stockholders."

In *American Land Co.* v. *Zeiss* (219 U. S., 47, 66) the United States Supreme Court said:

"On the contrary, we think the statute manifests the careful purpose of the legislature to provide every reasonable safeguard for the protection of the rights of unknown claimants and to give such notice as under the circumstances would be reasonably likely to bring the fact of the pendency and the purpose of the pro-

> ceeding to the attention of those interested. To argue that the provisions of the statute are repugnant to the due process clause because a case may be conceived where rights in and to property would be adversely affected without notice being actually conveyed by the proceedings is in effect to deny the power of the State to deal with the subject. The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals."

Security Savings Bank v. *California* (263 U. S., 282) involved a suit brought by the state to have transferred to it certain deposits in the bank which had been unclaimed for more than twenty years. It was argued the notice of the proceeding was insufficient because service was made by publication and it had not been shown in the proceeding by affidavit that personal service was impossible or impractical. The court pointed out that although such an affidavit is a common requirement in statutes providing for service by publication it is not constitutionally indispensable. Mr. Justice Brandeis said:

> "The reason for requiring the affidavit is that, ordinarily, personal service would be more likely to acquaint a defendant with the pendency of the suit. But here the general facts which underly the legislation established the futility of such a requirement. * * * The legislature evidently assumed that it would be impossible to serve such depositors personally. The supreme court of the state held that the legislature was warranted in this assumption. The owners of the deposits were, therefore, treated like persons unknown. * * * We cannot say that the view entertained by the legislature and the state courts was so unreasonable as to constitute a denial of due process" (pp. 288-289).

The court is of the view that the kind and manner of notice prescribed by the Legislature in this case were not,

under the circumstances, so unreasonable as to amount to a denial of due process of law. In respect of this new legal entity created by the Legislature and the administration of the common fund by it, the beneficiaries of the separate estates and trusts have been given not only notice of the investment but in addition a notice sufficient to enable them to keep constant check on the progress of the administration prior to accounting proceedings, during an accounting proceeding and after the accounting proceeding. Rights of inspection of records are granted to them which are not available to beneficiaries of ordinary trusts. The accounting proceeding is only an incident in the carefully formulated plan for the management of the fund entrusted to the trust company and closely supervised by experienced and competent public officials. There is full opportunity for beneficiaries not only to join in the accounting proceeding as a party but to keep in constant touch with the management of the fund. The statute provides for notice sufficient to apprise the beneficiaries of their rights and to enable those interested a full and complete opportunity to exercise their rights.

The objections of the special guardian representing income beneficiaries are accordingly overruled. An intermediate decree may be submitted on notice or consent if the parties so desire. When the special guardians have filed their final reports the court will dispose of the questions raised by the petitioner and any other issues properly raised herein.

Proceed accordingly.

APPENDIX "B"

VAN VOORHIS, *J.* (dissenting):

I dissent and vote to reverse the decree appealed from and to dismiss the petition upon the ground that the portion of section 100-c of the Banking Law relating to judicial settlement of common trust fund accounts is unconstitutional by reason of lack of provision for adequate notice to bene-

ficiaries. (*Matter of Security Trust Company of Rochester*, 189 Misc. 748 and cases cited.) As the opinion below states:

> "'The fundamental requisite of due process of law is the opportunity to be heard. * * * And it is to this end, of course, that summons or equivalent notice is employed' (*Grannis* v. *Ordean*, 234 U. S., 385, 394)."

The notice to the interested party must be such "as to make it reasonably probable that he will receive actual notice" (*Wuchter* v. *Pizzutti*, 276 U. S. 13, 19). While the legislature has the power to prescribe the type of notice, it "cannot enact that no notice need be given, or make that a notice which is no notice at all. To do that would be a fraud on the Constitution" (*Martin* v. *Central Vermont R. R. Co.*, 50 Hun 347, 350). Considering the proceeding as quasi in rem, the practicability of giving notice in a particular manner bears upon whether due process of law has been observed. Both appellant and the respondent trustee are in agreement that "the test of the adequacy of the notice * * * is a practical one depending upon all the circumstances of the particular case" (Appellant's Brief, p. 15; Respondent Trustee's Brief, p. 14). Although that statement may be an oversimplification, it has the merit of being concise and concrete, and it furnishes a satisfactory criterion for the purposes of this case.

It seems manifest that the notice of judicial settlement provided for by section 100-c of the Banking Law fails to meet that test of constitutionality. I do not consider that notice personally or by mail to all possible remaindermen is required by due process, but it appears affirmatively on the face of this statute that the notice which it authorizes is not calculated to notify interested parties, that the studied purpose of the Act is to avoid giving such notice as is practicable, and that it would have been entirely feasible to have provided for the giving of notice in such manner as would have been likely to reach those beneficiaries who are currently interested in the income, as well as the greater portion of those who are interested in the principal of the common fund. The only notice of judicial settlement of common trust fund accounts which is provided by this Act,

is publication for not less than once in each week for four successive weeks, in a newspaper to be designated by the Court, of a notice or citation addressed generally "without naming them" to all parties interested in such common trust fund and in the estates, trusts or funds mentioned in the petition (Banking Law, sec. 100-c, subd. 12). It is further expressly provided that not even the residence need be stated of the decedent or donor of any such estate, trust or fund. In this instance, the citation, addressed to no persons named as beneficiaries, was published four times in the New York Law Journal. Except to the eye of the most "wary vigilance", the publication of the citation in that manner was without practical effect.

The practicability of giving much more effectual notice than this appears from the clause in subdivision 9 of section 100-c that at the time of making the first investment of any estate, trust or fund in a common trust fund, the trust company shall send "a notice to each person of full age and sound mind whose name and address is known to such trust company at the time of sending such notice and who is then known to it to be or to claim to be included in the following class or classes: (a) those then entitled to share in the income therefrom, and (b) those who would be entitled to share in the principal if the event upon which the estate, trust or fund will become distributable should have occurred at the time of sending such notice." It is remarkable that so much care should have been taken by the statute to inform interested parties of the general structure of the law, and of the making of the initial investment in the common fund, which the beneficiaries would be powerless to alter or to prevent, but that the Act should limit so drastically as to render practically nugatory the much more important notice of the judicial settlement of the accounts of the trustees. Beneficiaries might be heard in court and perhaps have something to say about the accounting, which the Act implies to be undesirable. Captious or narrow-minded objections to trustees' investments are of course undesirable. They do cause unnecessary expense in litigation, and tend to promote excess caution on the part of trustees in invest-

ment policy. Nevertheless, due process of law requires that beneficiaries shall have reasonable opportunity to be heard, even if their objections may sometimes be ill advised.

The reasoning of respondent trustee is unsound that inasmuch as it may be impracticable to give notice by mail of application for judicial settlement to all possible remaindermen, therefore it is unnecessary thus to notify any interested persons, not even the income beneficiaries to whom the trust company is currently paying interest or dividends. The names and addresses of these last are on the books of the fiduciary, and the statute could easily have provided for the mailing of notices of the judicial settlement to them, as well as to the presently known persons whose names and addresses are or should be also upon the books of the fiduciary as persons entitled to share in the principal if the determining contingency were to have occurred simultaneously with sending out the notice of the initial investment. Such persons are required to be notified, as above stated, of the first investment in the common fund. They could just as easily be notified of the judicial settlement. To them could readily have been added, what the Act likewise omits, that notice of judicial settlement should be mailed to such other interested persons as shall have applied in writing to have their names and addresses carried on the books of the corporate fiduciary for that purpose. The circumstance that it may be impracticable to give effectual notice to all interested parties is hardly a reason for not giving such notice to any. This is recognized in the case of the statutory requirements applicable to the judicial settlement of the accounts of the committee of an incompetent, where notice is to be given in such manner as the court deems proper, and may be "to one or more relatives" of the incompetent (Civil Practice Act, sec. 1381, subd. 3; sec. 1360; cf. *Matter of Battey*, 260 App. Div. 362). That is more in accordance with the provision of the Uniform Common Trust Fund Act, section 2 of which permits judicial settlement of accounts "on such conditions as the court may establish", leaving it to the court to provide for such notice in the particular case as shall satisfy the requirements of due process.

On this appeal the question under review is whether the provisions of section 100-c of the Banking Law respecting notice are adequate, not how the statute could be redrawn so as to make them so. Nevertheless, in my view, it may well be that notice of judicial settlement would be adequate if, in addition to publication, it were mailed to beneficiaries currently receiving income from the trust company, as well as to such remaindermen and reversioners as were subject to notification under subdivision 9 at the time of making the first investment, plus such other persons having an interest in the principal or secondary income beneficiaries as might furnish in writing their names and addresses to the trust company for the purpose of receiving such notices. Perhaps provision could be made for adding other new names at stated intervals acording to some workable rule. Names could be authorized to be dropped from the list upon proof that their interests had ceased. This is not the occasion to try to formulate a new statute, but it seems to me that these, or some similar provisions, would furnish the minimal requirement, on the theory that the self-interest of those whom it would be practical to notify would be sufficiently similar to that of the others so that the latter could be said to be represented in some sense by the former.

It is idle to assert that without this exact provision of section 100-c of the Banking Law, common trust funds could not be established, in the face of the circumstance that it is not contained in the statutes of the other 28 states having legislation upon this subject.* The alternative is not between this statute or no statute at all. This would seem to be indicated sufficiently by the fact that the testimony in the record shows that the largest common trust funds enumerated are in Philadelphia, Pennsylvania (the Pennsylvania Company having a discretionary fund of 1,607 trusts worth $32,000,000, and a legal fund having 1,318 trusts worth $11,000,000), where there is no provision in the act authorizing the discharge of the trustee of the common fund by means of a court accounting of the administration thereof.

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* C. C. H. Trust and Estate Reports, Vols. I and II.

Supervision of these investment portfolios is not so much as confided to the superintendent of banks, whose functions are limited to granting permission to establish the common trust fund, approving the general plan, and to determining that the securities in the fund (or proceeds of sale thereof) are on hand, and that those securities which are required to be "legals" are actually such. "The superintendent shall have no other duty or responsibility in respect to the administration of common trust funds" (100-c, subd. 13). Even if the superintendent had supervisory power over the selection of these investments, that would not deprive the beneficiaries of the right to hold trustees to account for the exercise of reasonable care and good faith in respect to investments. The opportunity to exercise that right is reduced by this statute to the vanishing point. The broader powers of the superintendent with respect to ordinary banking operations do not supersede liability of bank directors to stockholders for negligence or other misconduct, nor to creditors if the bank becomes insolvent. The same is true of the superintendent of insurance with respect to insurance companies and policyholders.

The Legislature undoubtedly has a considerable latitude in determining the manner of notice to be given. Nevertheless, corporate or other fiduciaries cannot be exempted from practical accountability to interested parties, which in this instance would be in regard to what may easily become a major portion of trust business. The boundaries of legislative discretion are exceeded by an Act which bears upon its face the evidence that it was not designed to give the maximum notice that is practicable, but has been drafted so as to create the appearance without the substance of real notice to any of the beneficiaries. If as much attention had been devoted to devising methods of giving real notice as has been expended on concealing the absence of such notice, its constitutionality would have been well protected.

This constitutional infirmity does not extend to the part of section 100-c of the Banking Law relating to the establishment of common trust funds, and affects only the provision for the judicial settlement thereof. The last mentioned clauses are severable from the statute as a whole, and should

be struck down without invalidating the rest of the section. That would not destroy the authority under which existing common funds have been erected, but would leave trustees of such funds to be discharged by the judicial settlements of the participating estates and trusts, as is the case now under the laws of many other states, including Pennsylvania; or such trustees could obtain their discharges pursuant to some subsequent amendment of section 100-c of the Banking Law, provided that the Legislature enacts one authorizing notice to beneficiaries of judicial settlement of the accounts of trustees of common funds which conforms to due process of law.